STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2006
v	No. 261567 Oakland Circuit Court
ARIC BERNARD COHN, Defendant-Appellant.	LC No. 04-196938-FC

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(i). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 22 ½ to 75 years' imprisonment for each of the first-degree criminal sexual conduct convictions and ten to 50 years' imprisonment for each second-degree criminal sexual conduct convictions. We affirm.

I. FACTS

This case arises out of defendant's November 16, 2004 jury trial convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i) (victim between 13 and 16 years of age and a member of defendant's household), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(i) (victim between 13 and 16 years of age and a member of defendant's household).

Defendant was arrested on June 10, 2004 for sexually molesting a fourteen year old girl. Defendant stayed with the girl and her mother three or four times a week. He was convicted on November 16, 2004 and sentenced on December 1, 2004 as a fourth habitual offender, MCL 769.12, to 22 ½ to 75 years' imprisonment for each of the first-degree criminal sexual conduct convictions and 10 to 50 years' imprisonment for each second-degree criminal sexual conduct convictions. Defendant now appeals as of right.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant's first argument on appeal that he was denied the effective assistance of counsel.

A. Standard of review

Although defendant moved this Court to remand for a *Ginther*[1] hearing, his motion was denied and a hearing was not conducted. Therefore, this Court's review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. Analysis

To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin, supra* at 599-600. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

1. Insanity Defense

Defendant argues that trial counsel was ineffective for failing to have defendant evaluated to see if an insanity defense was viable. Defendant must first show that trial counsel's performance was deficient under an objective standard of reasonableness. *Carbin, supra* at 599-600. In this case, nothing in the record suggests that trial counsel had any reason to seek an evaluation of defendant's mental health. The presentence report states that defendant denied any prior or current mental health diagnosis. Moreover, because the defense of insanity entails a challenge to criminal responsibility for conduct, rather than the conduct itself, the presentation of an insanity defense would have been entirely inconsistent with trial counsel's strategy of arguing that the alleged events never occurred. Although a defendant may present inconsistent defenses, see *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997), doing so here would have significantly weakened the chosen defense. Given that the evidence against defendant consisted almost entirely of the victim's testimony, trial counsel's strategy was reasonable. As discussed above, this Court will not second-guess trial counsel's professional judgment regarding trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). We therefore conclude

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

that trial counsel was not deficient under an objective standard of reasonableness and defendant was not denied the effective assistance of counsel because of a failure to investigate an insanity defense.

2. Jury Array

Defendant also argues that trial counsel was ineffective for failing to properly raise and preserve a challenge to the jury array. To establish a prima facie violation of the fair-cross-section requirement of the United States Constitution, Amendment VI, occurred, trial counsel would have had to show the following: (1) the group alleged to be excluded must be a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the numbers of such persons in the community; and (3) the underrepresentation is due to systematic exclusion of the group in the jury-process. *People v Williams*, 241 Mich App 519, 525-526; 616 NW2d 710 (2000).

In this case, defendant argues that trial counsel was deficient for failing to argue the second and third prongs of the challenge to the jury array. Nothing in the record, however, even remotely suggests that the representation of African-Americans in venires from which juries are selected was not fair and reasonable or that any underrepresentation was due to systematic exclusion. Without such a showing, any challenge to the jury array would have been futile and trial counsel is not required to argue a meritless position. *People v Darden*, 230 Mich App 597, 605; 588 NW2d 27 (1998). We, therefore, conclude that defendant was not denied the effective assistance of counsel to due trial counsel's failure to properly challenge the jury array.

III. ADMISSION OF STATEMENTS TO POLICE

Defendant's second issue on appeal is whether the trial court erred in admitting statements the victim made to her brother and to the police.

A. Standard of Review

The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Walker*, 265 Mich App 530, 533; 697 NW2d 159 (2005). This Court will only find an abuse of discretion when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Walker, supra* at 533.

B. Analysis

Both parties acknowledge that the statements are hearsay. The dispute is over whether the trial court properly admitted the statements pursuant to MRE 803(2). Under MRE 803(2), a hearsay statement is admissible if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement cause by the event or condition." There are two primary requirements for the excited utterance: (1) there must be a startling event, and (2) the resulting statement must have been made while the declarant was under the excitement caused by that event. *Walker, supra* at 534.

The prosecution would first have to show that there was a startling event. *Walker, supra* at 534. In order to admit the excited utterance, some independent proof, direct or circumstantial, that the startling event took place must be in evidence. *People v Kowalak*, 215 Mich App 554, 559; 546 NW2d 681 (1996). In this case, the victim testified that before she called her brother and spoke with the police, defendant made sexual advances toward her. The victim's testimony is independent proof that the event occurred and it was not an abuse of discretion for the trial court to consider the event, a father making sexual advances toward his daughter, startling.

The prosecution would also have to show that the resulting statements were made while the victim was under the excitement caused by that event. *Walker, supra* at 534. There is no express time limit for excited utterances. The rule focuses on the lack of capacity to fabricate, not the lack of time to fabricate. Although the amount of time that passes between an event and a statement is an important factor in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. The question is not strictly one of time, but of the capacity for conscious reflection. *Walker, supra* at 534.

In this case, the 14-year-old victim called her brother seven to eight minutes after defendant tried to have sex with her. She sounded terrified when she made the statements and her voice was cracking up. She also sounded like she had been crying. On the basis of that evidence, we conclude that the trial court did not abuse its discretion in finding that the victim's statement to her brother, that defendant had tried to have sex with her, was made while she was under the excitement caused by that event. The statement was made minutes after the startling event and the victim's voice suggested she was still affected by it.

The victim also told a policewoman that defendant had tried to touch her. The exact time of that statement in relation to the startling event is unclear because the policewoman did not testify regarding how long she was at the house before she spoke with the victim. The policewoman did state that the victim was very upset and could not speak at first. When she did start talking, the victim was very soft-spoken. On the basis on that testimony, we conclude that the trial court did not abuse its discretion in finding that the victim's statement to the police, that defendant had tried to touch her, was made while she was under the excitement caused by that event. While the exact time of the statement is unclear, the record suggests that the statement was made soon after event. Furthermore, the victim's demeanor suggests that she lacked the capacity to fabricate the statement and that she was still under the effect of the event.

IV. SCORING

Defendant's third issue on appeal is whether the trial court erred in scoring Offense Variables (OV) 4 and 13.

A. Standard of Review

A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); MCL 769.34(10). Defendant did not object below to the factual basis for the scoring of the OV 4 and he cannot raise that argument on appeal except where

otherwise appropriate, as in a claim of ineffective assistance of counsel. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006); MCL 769.34(10).

B. Analysis

Defendant did properly object to the scoring of OV 4 and 13 on the basis of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). The proper construction or application of statutory sentencing guidelines presents a question of law that is reviewed de novo. *People v Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005). Defendant argues on appeal that, because the facts underlying the scoring of his guidelines were not proven by the prosecutor during trial, the enhancement of his sentence represents an unconstitutional violation of his Sixth Amendment right to a jury trial under *Blakely*, *supra* at 296. Our Supreme Court, however, has recently concluded that Michigan's sentencing scheme does not offend the Sixth Amendment on the basis that its sentences are based on facts not determined by a jury beyond a reasonable doubt and that *Blakely* does not apply to Michigan's sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). We therefore conclude that the trial court did not reversibly err in scoring OV 4 and OV13.

V. ACCURACY OF SCORING INFORMATION

Defendant's fourth issue on appeal is whether the trial court relied upon inaccurate information in sentencing defendant.

A. Standard of Review

A party shall not raise on appeal an issue challenging the accuracy of the information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. *Kimble*, *supra* at 309; MCL 769.34(10). Defendant did not object below to the accuracy of the information relied upon in determining defendant's sentence and he cannot raise that argument on appeal for the first time. *Kimble*, *supra* at 310-311; MCL 769.34(10).

VI. CRUEL & UNUSUAL PUNISHMENT

Defendant's fifth issue on appeal is whether his sentences are cruel and unusual because they are disproportionate and because the trial court failed to articulate on the record its reasons for deciding on the sentences.

A. Standard of Review

Defendant failed to raise this constitutional issue below so it is unpreserved. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

This Court reviews unpreserved constitutional issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial

rights. *Carines, supra* at 763. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Carines, supra* at 763. Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764.

B. Analysis

Defendant would first have to show a clear or obvious error in his sentences rendering them cruel and unusual. *Carines, supra* at 763. A proportionate sentence does not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004). A sentence within the guidelines range is proportionate absent a substantial and compelling reason to depart. *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). The guideline minimum range for the first-degree CSC convictions were 225 to 750 months or life. Defendant was sentenced to 22 ½ to 75 years' imprisonment for each first-degree CSC conviction. The sentences for the second-degree CSC convictions run concurrent with the other sentences, so scoring the second-degree CSC convictions was unnecessary. *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005). Defendant argues that the strong support of his family, the fact that he has been diagnosed as a drug addict, and his potential for rehabilitation constitute objective and verifiable reasons for departing downward from the sentencing guidelines. Defendant's presentence report, however, reveals that, due to defendant's many years of incarceration, he has not maintained close relationships with many of his family members. Defendant's somewhat extensive criminal history also weakens the argument based on his potential for rehabilitation. Viewing the record before the trial court, we conclude that the trial court's refusal to find substantial and compelling reasons to depart downward was not clear error and that, therefore, the sentences were not disproportionate. We therefore also conclude that defendant's sentences were not cruel and unusual punishment.

The trial court's reference to the sentencing guidelines when imposing a sentence within the guidelines is sufficient to satisfy the MCR 6.425(D)(2)(e) articulation requirement. *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996). In this case, the trial court referenced the sentencing guidelines when imposing sentences within the guidelines. We therefore conclude that the trial court properly articulated its reasons for defendant's sentences.

Affirmed.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette